§ 14.

The time spent on this very elementary sketch will hardly be grudged by the student, since the subject itself is not without interest[3], and it has introduced us to some topics which must necessarily be understood if we are to have an intelligent grasp of the subject of property.

Section II.—Of Possession.

§ 1.

The reader will observe that we have already several times used the word "possession" as a term intimately connected with property and ownership. But possession, as understood in law, is something different from what is meant by the term as used in popular language.

In the first place, possession does not mean mere corporal seizure or contact. If a man carrying a bundle containing his clothes, sits down in a field by the way side and deposits the bundle near him, he is certainly in possession of the bundle, though it does not happen to be in his hands, and he is certainly not in possession of the field, although he is in actual corporal contact with it.

§ 2.

The physical element in possession is therefore not mere holding or contact, but *the possibility of dealing with a thing as we like and of excluding others*[4].

Supposing a person wishes to put me in possession of a field which he has sold me; the price is paid and the contract of sale signed: it is not necessary that I should walk over every part of the land. I simply enter upon it, the seller assents, and I am in

[3] Those who have leisure to see for themselves what hidden interest lies in these questions of early law, will find in Maine's "Ancient Law," in his later work, "Village Communities," and in M. de Lavaleye's "Primitive Property," a wealth of information.

[4] Markby, § 321.

possession. But supposing that on going to take possession I find some one already on the spot who disputes my right. I, the buyer, cannot then be said to have possession till the opposition is overcome by consent or by force.

Just so with movable property. I buy a coat. I need not put it on to be in possession. I am equally in possession of it if it is put in my wardrobe.

§ 3.

Nor is it necessary that possession should be continuously exercised at every moment of time; but a man *continues in possession as long as he can at any moment reproduce the physical power of dealing with the property as he pleases.* A man who goes away from his house to a place of business, is still in possession of his house, because he can at any time return to it and enter it.

§ 4.

But possession recognised as such by the law, also requires—besides the physical power of dealing with the property, *the intention of the person to exercise the control on behalf of himself;* and this is ascertainable from the circumstances[5] of the case with which we happen to be dealing.

§ 5.

A person may also be in possession of a thing through his representative; and the correct doctrine is that this is not a fictitious but a real legal possession[6]. "All that is necessary to possession

[5] That possession (in a legal sense) consists not only in the physical control, but also in the determination to exercise it on one's own behalf, is also apparent if we consider how possession is transferred. Mr. Markby gives the following example (§ 336, p. 178):

Suppose that you and I are living in the same house; that you are the owner, and that I am a lodger. And suppose that you, being in want of money, sell the house to me; that you receive the money and formally acknowledge me as the owner, agreeing to pay me a weekly sum for permission to you to continue to reside in the house. No external change whatever need have been taken place in our relative position; we may continue to live on precisely as before, yet there can be no doubt that I am now in possession of the house and that you are not.

[6] Markby, §§ 339—340.

being the power to resume physical control, and the determination to exercise that control on my own behalf, I possess the money in the pocket of my servant, or the farm in the hands of my bailiff, just as much as the ring on my finger, or the furniture of the house in which I live."

This assumes the representative to be in friendly relation; that is, that he is not acting against me: the moment he does so and means to assume control *on his own behalf*, properly speaking, my possession is gone: or it is only by special devices and provisions of law[7] that my possession is held not to be lost.

In order, therefore, to have a valid "possession by representative," the representative must be in control by consent of the principal, and that with the intent to exercise his control on behalf of the principal[8].

Some consequences which follow from this doctrine, such as the possession by a court of wards, or a guardian on behalf of a minor or lunatic, need not be entered upon.

§ 6.

It may be well, however, to say a few words about the relation of landlord and tenant, which is intimately connected with this matter. We have all heard in India of "tenants with occupancy rights" and "tenants at-will."

[7] In English law, if you have received land from me on the understanding that you are to hold it on my behalf, there is hardly anything you can do that is *held legally to oust my possession*.

[8] In discussing the Burma landholdings in the Land Revenue Manual I referred to the definition of "possession" given in Act II of 1876, section 2. There possession was equally maintained if it was by a man's servant, agent, tenant, or mortgagee holding under him. Nor was the possession broken if the land was left to lie fallow in the course of husbandry, but had previously been held in the way described. So possession was maintained by the significant act of *paying the Government revenue* due on it, either personally or by agent, &c. This latter point is applicable everywhere in India. If ever it is shown that a certain person provided the funds for paying the revenue, even if he did not himself make the payment, it would go far to show that he was in possession, and the person ostensibly in occupation had in law a merely *representative* possession.

Under English law, and under most continental law, a tenant has always been held to have *only representative possession*, and that in spite of many express rights and remedies which would (if not guarded by the general doctrine) imply that he had a legal possession on his own account. On this view, the tenant is treated in fact, as a sort of bailiff for the owner, paying him a fixed sum out of the profits of farming, and retaining the remainder as his remuneration[9].

This mention of the English law is not superfluous, as it cannot be denied that from time to time it has largely affected the ideas which officials in India have entertained regarding the relation of the "zamíndár" to his tenant. The ancient law will not afford us any help, for the eastern mind did not, either in its customs or its legal systems, look at things in this way at all. The present relation of landlord and tenant has grown up to a great extent under the operation of our western law. We recognised a proprietary right in land, and in some cases the proprietor was a person who had, in the course of events, overridden the rights of the original landholders, and these latter then came into the position which, for want of a better name, we call that of tenant.

The position of such a 'tenant' then became somewhat perplexing to the Indian lawyer. We solved the question (speaking roughly) by various "tenant laws," which secured a permanent right of occupancy to such of these tenants as had either an originally higher position, or who had, at least by custom and general sentiment, some special claim to consideration. Thus, our solution of the question was necessarily not one based on any philosophically consistent theory, but on a desire to make some arrangement which would secure a practically valuable and lasting interest in the land to each of the different classes concerned.

Consequently, in India, we must probably conclude that "tenants-at-will," those who have nothing particular in their favour, and are only on the land by lease or contract, have a representative

[9] Markby, § 356.

possession; and with regard to those who have rights of occupancy, and cannot be ejected, may still be in representative possession to some extent; because they *pay rent* to some one: and that person's possession continues in the act of receiving his rent, to say nothing of his paying the Government revenue.

Mr. Markby[10] observes that, on the whole, while our law shows, on the one hand, a decided inclination to treat the tenant as having only a representative possession on behalf of the owner, on the other hand, his "right of occupancy" is clearly a right which is available against all the world, and not merely as by way of contract between him and the owner, in which case his possession is that of a "servitude" or right of continued user, not merely a mere contract-right. His possession then is, as I said, to some extent representative, and to some extent not: we cannot help the conflict of the two positions which arises out of the circumstances.

§ 7.

Returning to the general subject of possession, it may next be remarked that as actual physical prehension is not a necessary element in possession as understood in law, it may be possible to be "in possession" of things not actually tangible.

It is not, however, to all "incorporeal" rights that the idea of possession can be extended. We must not press the extension beyond what is fair; we can, however, speak reasonably enough of a person as in possession of a 'right of way' or of a 'watercourse'; and *hence possession extends generally to those rights which are called 'servitudes' such as the "forest rights,"* of which we shall have much to learn hereafter[1].

§ 8.

There is a peculiarity connected with possession in such cases which must be noticed. A person who has a right to cut firewood

[10] Markby, § 357.

[1] I need hardly quote authorities for the position that a *right* can be in *possession*. It is admitted as well in the French and German as well as English text-books.

cannot be engaged in cutting it every moment of his life. A man is not perpetually going to and fro over the land which is subject to his right of way. For months together in a dry season, no water may flow off my land on to my neighbours'. Such rights are spoken of by lawyers, owing to this circumstance, as "discontinuous" rights. Although it is easy to feel that such a right is still in possession, though it may not have been actually exercised for several days, or weeks or even months, at the same time we feel that, if, say, for several years, the right-holder had not once crossed my field, or during more than one winter (when firewood was most needed) had not once taken a stick from my forest, there might be very considerable doubt about his having maintained actual possession of the right. It is always a question of fact, whether, in spite of such an *intermission*, the right has been maintained[2]. But such intermissions are always dangerous, for, if the right has been intermitted for two years *next before* bringing a suit to establish the right, the right would be lost[3]. An *intermission* is not the same thing as an *interruption*. Under the Limitation Act an interruption is the act of some person against the right; it is, in fact, an indication that the right is disputed; and if the interruption is suffered or acquiesced in for a whole year, the right is lost[4]. The period after which an uninterrupted use gives a right, is twenty years under section 26 of the Indian Limitation Act.

§ 9.

There also remains one other point which I should notice, because *joint-ownership* is so very common in India. I allude to the nature of *possession in the case of co-proprietors*. The maxim of

[2] The English law has a distinction between rights of common and easement in this respect which has not been maintained in the Indian Act. In England an intermission at any rate of a right of common is no bar to a proof of a general user and possession for the required period (Williams p. 178.)

[3] Act XV of 1877, sec. 26: see illustration *b*.

[4] The Act explains that an 'interruption' occurs where the soil-owner or some third person obstructs the exercise of the right, and the obstruction is submitted to (being known) for a whole year.

English lawyers is that if there be two equal co-owners "each is possessed of the whole and the half." Each owner of the undivided property has access to and control over, every part of the property; and he exercises that control not only on behalf of himself alone, but partly in respect of his own share, and partly as representative of the co-owner.

It is well known that amongst Hindús, ancestral property is owned by the whole family. To take Mr. Markby's example. A Hindu dies leaving three sons; these three are the co-owners of the estate. The most correct view seems to be that the family is not considered as a corporation (a term I shall presently explain), but that no member of the family can assert that any part of the family property belongs *exclusively* to himself; but while he has a certain control over the whole, he is also in legal "possession" (as above explained) of his own right or share[5].

The village community of which we have heard so much in the Manual of Land Revenue Law and Land Tenures, is at once an organised patriarchal society, and an assemblage of such co-owners.

§ 10.

It only remains to be added that co-ownership must not be confounded with the ownership of "juristical persons," that is, of a body of persons *whom the law regards as one person.* Where property belongs to a body, to a registered "company" or a "corporation," the law regards the whole as *one* legal owner, and artificial provision is made for the exercise of the rights of the body by a representative; and a "common seal" is usually provided in order to attest the acts of the body. The legal possession of property is then in the one *juristical person,* not in the individual members, as it is in co-ownership.

§ 11.

Then, as to being put out of possession; *every act by which physical control is completely destroyed, puts a man out of possession:*

[5] See Markby, paras. 311—312.